IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. ____

W. W. CHAMBERS COMPANY, INC., *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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W. W. CHAMBERS COMPANY, INC., *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, W. W. Chambers Company, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, dated June 16, 1960.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit has not yet been reported. A copy is appended as Appendix A.

The opinion of the National Labor Relations Board has not yet been reported. (R. 93)

STATEMENT OF JURISDICTIONAL GROUNDS

The opinion of the United States Court of Appeals for the District of Columbia Circuit and its judgment in favor of respondent was made and entered June 16, 1960. No petition for rehearing was filed.

This Court has jurisdiction of the questions presented under the provisions of Sec. 10(e) and 10(f) of the Labor Management Relations Act of 1947 as amended, 29 U.S.C.A. Sec. 160 *et seq.*; and Title 28 U.S.C. Sec. 1254.

QUESTIONS PRESENTED

1. Was the petitioner denied due process of law in these proceedings and was the petitioner denied substantial rights granted by the Labor Management Relations Act as amended and the Administrative Procedure Act as well as constitutional guarantees in the failure of the Trial Examiner of the Board: (a) to accord petitioner, who was without counsel, a fair hearing; (b) denial of petitioner's right to present material evidence; and (c) right to present witnesses in his own behalf both at original hearing and request to the Board, particularly in view of the fact that he was without legal counsel and was not skilled in legal procedure.

2. Whether the Board's order enforced by the decree below is supported by substantial evidence on the

record considered as a whole as required by Sec. 10(e) of the Act, and was there a violation of Sec. 8(a)(3) and (1) of the Act.

3. Was the Board's order beyond its power under Sec. 10(a) and (c) of the Act?

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act and its amendments and the Administrative Procedure Act are set forth *infra*, in the Appendix C, p. 6a.

STATEMENT

Petitioner, W. W. Chambers Company, Inc., is a corporation duly organized under the laws of the District of Columbia. It maintains its principal office and place of business at 14th and Chapin Streets, N. W., Washington, D. C., where it has been continuously engaged in the business of an undertaker.

Pursuant to charges initiated by the Office Employees International Union, Local 2, AFL-CIO, the general counsel of the National Labor Relations Board, on behalf of the Board, issued a complaint against the petitioner (designated as Case No. 5-CA-1497), alleging that W. W. Chambers Company, Inc. had engaged in unfair labor practices within the meaning of Sec. 8(a)(1) and 8(a)(3) and Sec. 2, subsections (6) and (7) of the Labor Management Relations Act as amended, in that it had discharged Duane G. Morrison and Bernard Crase because of their membership in, assistance to, or activity on behalf of the Union, and by interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Sec. 7 of the Act. In due course, petitioner, in proper

person, denied by answer the commission of any unfair labor practices with a denial of operation of the petitioner in the State of Maryland. A hearing was held before Trial Examiner A. Bruce Hunt on June 8, 1959. At the hearing, Thomas W. Kennedy, Esq. appeared for the General Counsel of the Board, Patrick J. Foley, Esq. appeared for the Union, and W. W. Chambers appeared without counsel for the W. W. Chambers Company, Inc.

The Board's entire case consisted of the testimony of Emmett C. Etheredge, the Union's business representative, Garyton C. Echols and Robert E. Tolson, general manager and assistant general manager, respectively, of W. W. Chambers Company, Inc., Duane G. Morrison and Bernard Crase, former employees of W. W. Chambers Company, Inc. Mr. W. W. Chambers testified for the petitioner. At the hearing, which was concluded in one day, the Trial Examiner refused to admit into evidence the findings of the District Unemployment Compensation Board made on May 20, 1959 on the issue of discharge of Morrison and the reasons therefor, as complained by Morrison, which proffer of evidence was made to show prior inconsistent statements to prove the witness not credible because he had changed his story. Petitioner further was allowed but five minutes to see affidavits which had been obtained from Tolson and Echols, and of which General Counsel for the Board had apprised the petitioner of their existence nor their contents. The Trial Examiner closed the proceedings without giving petitioner additional time to present witnesses in his behalf, knowing full well that petitioner was without counsel, and chose to ignore his basic responsibility of due process of law and fair play to the petitioner.

On June 26, 1959, petitioner filed a motion to dismiss the complaint, also in proper person, which thereafter was denied by the Trial Examiner.

On August 21, 1959, the Trial Examiner issued his Intermediate Report and Recommended Order, finding the petitioner had committed unfair labor practices by discriminating in regard to the hire and tenure of employment of Bernard Crase and Duane Morrison, thereby discouraging membership in a labor organization, and has and is engaging in unfair labor practices within the meaning of Sec. 8(a)(3) of the Act, and by interfering with, restraining and coercing its employees in the exercise of rights guaranteed in Sec. 7 of the Act, the petitioner had engaged in unfair labor practices within the meaning of Sec. 8(a)(1) of the Act, and that the aforesaid labor practices affect commerce within the meaning of Sec. 2(6) and (7) of the Act. Petitioner duly filed exceptions to the Intermediate Report and Recommended Order, challenging the propriety and legality of certain of the Trial Examiner's findings and recommendations which were adverse to the petitioner.

Petitioner requested permission to be afforded the opportunity to present the proper number of witnesses to sustain his case and, further, asked permission to argue orally before the Board to clarify the position of the petitioner, both requests being denied. The decision and order of the Board was issued December 8, 1959, (order and decision of the Board J.A. 93) adopting in its entirety the findings and conclusions and recommendations of the Trial Examiner.

Thereafter, petitioner sought review before the United States Court of Appeals for the District of Columbia Circuit upon various grounds, summarized as follows:

1. Whether the petitioner was accorded due process of law in these proceedings and whether the petitioner was denied substantial rights granted by the Labor Management Relations Act as amended and the Administrative Procedure Act as well as the Constitution of the United States;

2. Whether substantial evidence on the record considered as a whole was required by Sec. 10(e) of the Act to support the Board's findings that petitioner in violation of Sec. 8(a)(3) and (1) of the Act discriminatorily discharged its employees;

3. Whether the Board had jurisdiction of this case;

4. Whether prejudicial error was committed by the Board in sustaining Trial Examiner's refusal to admit material evidence by petitioner, whether in the circumstances of this case petitioner, being without counsel and not skilled in legal procedures, the Board's refusal of petitioner's request to present further testimony constituted prejudicial error together with sustaining an erroneous ruling by the Trial Examiner during the course of the hearing, exceptions to Trial Examiner's Report and Recommended Order together with motions;

5. Whether the Board's Order was beyond its power under Sec. 10(a) and (c) of the Act. That Court on June 16, 1960 filed its brief opinion affirming the Order of the Board.

The Court of Appeals Erred:

1. In holding that petitioner was not denied due process of law as well as substantial rights granted by the Labor Management Relations Act and the Administrative Procedure Act on the issue of a fair

hearing, the denial of petitioner's right to present material evidence, as well as witnesses in his own behalf, both at original hearing at request of the Board, particularly in view of the fact that he was without legal counsel and was not skilled in legal procedure.

2. In holding (per curiam and without discussion) that the Board's findings were supported by substantial evidence on the record considered as a whole under Sec. 10(e) of the Act and that petitioner was in violation of Sec. 8(a)(3) and (1) of the Act.

3. In enforcing the Board's order under Sec. 10(a) and (c) of the Act.

REASONS RELIED UPON FOR GRANTING THE WRIT

The Court below, in its decision, has so far sanctioned the departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The decision of the Court below is in conflict with applicable decisions of this Court as well as the Second, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits.

The questions decided by the Court below and presented in this petition are important questions of Federal law which have not been, but should be, settled by this Court.

I.

The Court Below, in Its Decision, Has So Far Sanctioned the Departure From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

Sec. 10(b) of the Act provides, in regard to hearings on complaints of alleged unfair labor practices: "... Any such proceedings shall, so far as practicable, be conducted in accordance with the rules of evidence

applicable in the District Courts of the United States under the Rules of Civil Procedure for the District Courts of the United States adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C. Title 28, Secs. 723(b), 723(c).)"

The right to cross-examine as well as the right to admit documentary evidence on credibility is so accepted and usual in judicial proceedings and so fundamental in our system of law that it should require no citations of authority. The record in this case leaves no doubt that the evidence sought to be introduced was material (J.A. 48 and 67) and the rejection by the Trial Examiner was prejudicial. In *N.L.R.B.* v. *Indiana and Michigan Electric Company*, 318 U.S. 9, 28, the Court (in remanding the case to permit the taking of rejected testimony) states: ". . . Courts . . . are granted some discretion to see that the hearings do not shut off a party's right to produce evidence or conduct cross examinations material to the issue. Findings cannot be said to have been fairly reached unless material evidence which might impeach as well as that which will support its findings is heard and weighed." In *McCandless* v. *U.S.* (298 U.S. 343, 80 L. Ed. 1205) this Court held that a trial court's exclusion of material evidence and rejection of offer of proof of such relevant and competent evidence was denial of substantial rights. The Court said (pp. 346-348): "An offer of proof cannot be deemed as remote or speculative because it does not cover every fact necessary to prove the issue . . . could not be otherwise than prejudicial."

Petitioner submits that the refusal of the Trial Examiner to permit the introduction into evidence the findings of the District Unemployment Compensation

Board on the issue of discharge of Duane Morrison and the reasons therefor, as complained by Morrison, was gross error as the findings revealed that Morrison's discharge was for not rendering satisfactory service to the employer in the matter of ambulance service, and nothing was contained therein about discharge for union activities, which was in direct conflict with Morrison's testimony at the National Labor Relations Board hearing (J.A. 43). This documentary evidence not only supported petitioner's reason for discharge, but goes to discredit credibility of Morrison as a witness (J.A. 67). It is well settled under the uniform rules of evidence, Rule 63 (15), that admission of such documents into evidence is proper to show prior inconsistent statements to prove the witness not credible because he has changed his story. (See *N.L.R.B* v. *Quest Shon Mark Brassiere Co., Inc.*, 2d Cir. 185 Fed. 2d 289, also *Staswkevich* v. *Nicolls*, 168 Fed. 2d 474).

The Examiner, in his quasi-judicial role, did not acquaint a layman of the effect of technical legal questions nor of the legal effect of the proceedings, the only mention being made of the procedure at the end of the hearing after the die was cast. As was so succinctly stated by the Court in *N.L.R.B.* v. *Prettyman et al.* (117 Fed. 2d 786, 6th Cir.), the maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. According to the fundamental principles that inhere in the due process of law, an indispensable requirement of such hearing is that the course of proceedings shall be appropriate to the case and just to the employer that he shall be notified of the charges against him in time to meet them, and shall

have an opportunity to be heard and to cross-examine the witnesses against him, and shall have time and opportunity at a convenient place after evidence against him is produced and known to him to produce evidence and witnesses to refute the charges. It excludes the existence of arbitrariness, or prerogative or even wide discretionary authority on the part of the Government.

Copies of affidavits that had been obtained from Tolson and Echols were kept from petitioner and only at the hearing the Examiner gave petitioner but five minutes to see these affidavits once they had been offered for identification. Petitioner submits that he was entitled initially to see and examine what use may be made of them and, by analogy, *Jencks* v. *U.S.* (353 U.S. 657, 77 S. Ct. 1007) applies. Petitioner contends that he was not even accorded decent rudiments of fair play. In *Morgan* v. *U.S.* (304 U.S. 1, 58 S. Ct. 773) it was stated: "The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principle, and that in administrative proceedings of a quasi-judicial character, the liberty and property of the citizen shall be protected by the *rudimentary requirements of fair play* (Italics ours) and that no order is just if obtained without due process of law."

II.

The Decision of the Court Below Is in Conflict With the Decisions of This Court and of Other Courts of Appeal on the Same Subject Matter.

The Court below, in holding that there was substantial evidence supporting the findings and the findings support the order in violation of Sec. 8(a)(1) and 8(a)(3) of the Act is in direct conflict with the

various Circuits as to what is necessary to make illegal violations under the Act. Viewed against the background of many cases of this type decided in the Circuits, the Board acted on a relatively meager showing of interference in the so-called interrogation of employees. To be illegal such interrogation must amount to interference, restraint or coercion of employees (*N.L.R.B.* v. *McGahey*, 233 Fed. 2d 406, 5th Cir.). It is effect and not motivation of employer's action which determines whether he has violated Sec. 8(a)(1) of the Act. *N.L.R.B.* v. *McCatron* (216 Fed. 2d 212, 9th Cir.) held that a finding that employer violation of 8(a)(1) of the Act by interrogating employees regarding union activity, there being no threat in the interrogation, was error, and to sustain violation such interrogation must either contain expressed or implied threat or promise which tendency is to restrain or coerce. In *N.L.R.B.* v. *Protein Blenders*, (215 Fed. 2d 749, 8th Cir.) the rule was laid down that a mere polling of employees by employer as to union sentiment is not *per se* a violation of 8(a)(1) if it had not the effect of restraining or coercing employees in the exercise of their statutory rights. In that case, as are the facts in the instant case, employer had no history of any union animosity and the poll itself was unaccompanied by actual threats or promises of benefits and was without implied threats or economic reprisal. (See also *N.L.R.B.* v. *Hill and Hill Truck Lines*, 266 Fed. 2d 883, 5th Cir.; *N.L.R.B.* v. *Arthur Winer*, 194 Fed. 2d 370, 7th Cir.). The evidence of inquiries made by Echols and Tolson upon which the Board relied for violation of 8(a)(1) of the Act does not have the effect of restraining or coercing these employees since there is no evidence of any actual threats or promises of benefits made nor were any im-

plied threats of economic reprisals made as required under the aforementioned cited cases in the Circuits. (See Tolson testimony (J.A. 15 and 16) and Echols testimony (J.A. 23 and 24).) Under Sec. 8(a)(3) the Board found petitioner in violation by discriminatorily discharging employees, Bernard Crase and Duane Morrison (J.A. 77-78). The Board completely accepted the entire testimony of Crase and Morrison while refusing to credit W. W. Chambers. Substantial evidence must be deduced that the employee was engaged in activities protected by the Act and was discharged because he was engaged in such activities. The Board acknowledged that neither Tolson nor Echols knew of Morrison's or Crase's interest in the union and that there was no direct testimony that Mr. Chambers knew of their interest in the union (J.A. 80). Through inference on the possibility an employee named Howard might have told Chambers (Howard did not testify.) (J.A. 80), *a fortiori* Chambers knew that Crase and Morrison were active in the union. This, petitioner submits, is inference piled on inference in an attempt to find a substitute for evidence. *N.L.R.B.* v. *West Point Manufacturing Co.* (245 Fed. 2d, 783, 5th Cir.) states that knowledge by an employer of discharge's union membership is a prerequisite to a finding that discharge was made for that reason, and *N.L.R.B.* v. *Citizen-News Company* (134 Fed. 2d 970, 9th Cir.), in answer to the Board's emphasis upon the timing of the discharge, linking it to the date when certain union activities occurred, stated the fact that a discharged employee may be engaged in labor union activities at the time of discharge taken alone is no evidence at all of a discharge as a result of such activity. It is to be noted that not one witness was produced by the Board to sustain the fact that Chambers knew through

interrogation with other employees of Crase's or Morrison's union activity.

The Board, in inferring facts for the basis of a violation of Sec. 8(a)(3) by the Petitioner, while refusing to credit Chambers' testimony, was not in accordance with the legislative intent of the Act nor with the decisions of other Circuits on the same subject matter. In *N.L.R.B.* v. *Chronicle Publishing Company* (230 Fed. 2d 543, 7th Cir.) it was stated: ". . . Conversely we think that an employer with a friendly, sympathetic union attitude is entitled to credit in characterizing its acts which in themselves may not be discriminatory." Thus, a showing of lack of anti-union bias was denied petitioner by failing to credit his testimony which was substantiated by other Government witnesses as well as proffer of documentary proof. Petitioner contended that the discharge of Crase and Morrison may not be inferred by the Board from employees' mere membership in the union unknown to the employer in the record of this case. (See *N.L.R.B.* v. *Milwaukee Electric Tool Corp.* (237 Fed. 2d 75, 7th Cir.) and *Indiana Metal Products Corp.* v. *N.L.R.B.* (202 Fed. 2d 613, 7th Cir.).) In the legislative history of the Labor Management Relations Act, 1947, the Conference Report states that the amendments to the Act are designed to prevent the Board from inferring "facts . . . that are not consistent with evidence in the record." (See Legislative History, Labor Management Relations Act, 1947 at 560.) Thus, under the amended statute, the Board cannot concentrate under one element of proof to the exclusion of others without adequate explanations of its reasons; it cannot substitute its own expertness for evidence in deciding cases, nor can it discredit evidence that is in conflict with its findings without adequate explana-

tion. It is the duty of the reviewing Court under the amended statute to prevent the Board from engaging in any of these practices and to refuse enforcement of an order based upon a decision so rendered.

The record before the Board and the Court below reveals that the Board ignored all the evidence given by one side and with studied design gave credence to the testimony of the other side. In short, the record reveals that the Board continued to engage in practices which the amended statute had been designed to eliminate. As a safeguard against decisions based on administrative zeal rather than objective justice, the Congress passed the Labor Management Relations Act of 1947. The evidence to justify violations ought therefore to be substantial on the record as a whole and surmise or suspicion, even though reasonable, is not enough so far as the Act (29 U.S.C.A. 151 et seq.) goes. (*N.L.R.B.* v. *Tex-O-Kan Mills*, 122 Fed. 2d 433, 438, 5th Cir.) and (*C. G. Conn, Ltd.* v. *N.L.R.B.*, 108 Fed. 2d 390, 7th Cir.)

This Court, under the *Universal Camera Corp.* v. *N.L.R.B.*, (340 U.S. 474, 71 S. Ct. 456) stated that the Courts must find that the findings of the Board are supported by substantial evidence on the record as a whole and that includes the body of evidence opposed to the Board's view. The petitioner respectfully urges this Court that there has been a manifest lack of substantial evidence on the record considered as a whole that there was a violation of Sec. 8(a)(1) and 8(a)(3) of the Act.

Petitioner asserts that the Board's order is beyond its power under Sec. 10(a) and (c) of the Act in that it is not predicated on a valid, unfair labor practice under Sec. 8(a)(1) and 8(a)(3) and, further, no order

is just if obtained without due process of law. (*Morgan v. U.S.*, 304 U.S. 1, 58 S. Ct. 773.)

Petitioner most respectfully submits that there is no magic in giving lip service to the bare formula: "Substantial evidence supports the findings and the findings support the order" where the record, on its face, shows petitioner's case was not fully heard, that procedure required by law has not been followed, and where the standards for review established by this Court have not been fulfilled.

Because of the reasons stated, the decision of the Court below is in conflict with applicable decisions of this Court as well as the various circuits, and this intercircuit conflict should be resolved.

CONCLUSION

The issues presented are of substantial importance in the administration of the Act and the necessary safeguards of due process of law and the decision below conflicts in principle and result with the decisions of this Court and Courts of Appeal. It is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

THOMAS B. SCOTT
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APPENDIX

APPENDIX A

Opinion

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15472

W. W. CHAMBERS COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition to Review, and on Cross Petition for Enforcement of, an Order of the National Labor Relations Board

Decided June 16, 1960

Mr. Thomas B. Scott for petitioner.

Mr. William J. Acratis, Attorney, National Labor Relations Board, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Messrs. Dominick L. Manoli*, Associate General Counsel, National Labor Relations Board, *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, and *Miss Fannie M. Boyls*, Attorney, National Labor Relations Board, were on the brief, for respondent. *Messrs. Thomas J. McDermott*, Associate General Counsel, and *Russell Specter*, Attorney, National Labor Relations Board, also entered appearances for respondent.

Before EDGERTON, FAHY, and DANAHER, *Circuit Judges*.

PER CURIAM: W. W. Chambers Co., Inc. asks us to set aside, and the National Labor Relations Board asks us to enforce, an order of the Board. The Board has jurisdiction because the Company's undertaking business is "within the District of Columbia". 29 U.S.C. § 152(6).

The Board found that the Company had engaged in unfair labor practices of two sorts: discriminatorily dis-

charging employees Crase and Morrison, and coercively interrogating employees, in violation of the National Labor Relations Act as amended. Labor Management Relations Act, 29 U.S.C. §§ 158(a)(3) and 158(a)(1). The Board ordered the Company to cease and desist from discharging or discriminating against employees because of union activities, from interrogating employees in a manner constituting interference with their rights under the Act, and from interfering with or coercing them in any other manner in the exercise of their rights under the Act. The order also required the Company to reinstate Crase and Morrison with back pay and to post appropriate notices. Substantial evidence supports the findings and the findings support the order. The order will be enforced.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1959

No. 15,472

W. W. CHAMBERS COMPANY, INC., *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

On Petition to Review, and on Cross-Petition for Enforcement of, an Order of the National Labor Relations Board.

Before: EDGERTON, FAHY and DANAHER, *Circuit Judges*.

Judgment and Decree

This case came on to be heard on the record from the National Labor Relations Board, and was argued by counsel.

On Consideration Whereof, it is ordered and decreed by this court that the order of the National Labor Relations Board on review in this case will be enforced.

Pursuant to Rule 38(1) the respondent shall within 10 days hereof serve and file a proposed enforcement decree.

Per Curiam.

Dated: June 16, 1960.

Decree

Before: Edgerton, Fahy and Danaher, *Circuit Judges.*

This Cause came on to be heard upon the petition of W. W. Chambers Company, Inc. to review and set aside an order of the National Labor Relations Board dated December 8, 1959, and directed against petitioner, its officers, agents, successors and assigns, and upon the Board's cross-petition for enforcement of said order. The Court heard argument of respective counsel on May 25, 1960, and has considered the briefs and the transcript of record filed in this cause. On June 16, 1960, the Court, being fully advised in the premises, handed down its decision granting enforcement of the Board's said order. In conformity therewith, it is hereby

Ordered, Adjudged and Decreed by the United States Court of Appeals for the District of Columbia Circuit that the order of the National Labor Relations Board in said proceedings be, and the same hereby is enforced and that W. W. Chambers Company, Inc., its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

Dated: July 12, 1960

Henry W. Edgerton
Judge, United States Court of Appeals for the District of Columbia Circuit

CHARLES FAHY
Judge, United States Court of Appeals for the District of Columbia Circuit

JOHN A. DANAHER
Judge, United States Court of Appeals for the District of Columbia Circuit

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APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECREE of the United States Court of Appeals enforcing an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT discourage membership in OFFICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2, AFL-CIO, or in any other labor organization of our employees, by discharging any of our employees because of their concerted or union activities, or in any manner discriminate in regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT interrogate our employees concerning union affiliation or activities in a manner constituting interference, restraint or coercion in violation of Section 8(a)(1) of the Act.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of the rights to self-organization, to form labor organizations, to join or assist OFFICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2, AFL-CIO, or any labor organization.

to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as authorized in Section 8(a)(3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

WE WILL offer BERNARD CRASE and DUANE MORRISON immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to any seniority or other rights or privileges previously enjoyed.

WE WILL make whole BERNARD CRASE and DUANE MORRISON for any loss of pay they may have suffered as a result of our discrimination against them.

All our employees are free to become or remain, or to refrain from becoming or remaining, members in good standing of OFFICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2, AFL-CIO, or any other labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8(a)(3) of the National Labor Relations Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

W. W. CHAMBERS CO., INC.
(Employer)

Dated By
(President)

*This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX C

Statutes Involved

Federal Administrative Procedure Act:

* * * *

Section 7(c):

Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form. (Title 5 Sec. 1006(c) U.S.C.A.)

Section 10(e): *Scope of review.*

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in

excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 or 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. (5 U.S.C.A. 1001, et seq.)

Labor Management Relations Act, 1947 as amended:

* * * * *

Section 7:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3). (Title 29, Sec. 157 U.S.C.A.)

Section 8(a):

It shall be an unfair labor practice for an employer:

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: provided, that nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined

in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, * * * *. (Title 29, Sec. 158 U.S.C.A.)

Section 10:

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and tranportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in

which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, Secs. 723-B, 723-C).

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or sec-

tion 9(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed. (29 U.S.C.A. 159(c) 160(a, b)).

Section 11:

For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The

Board or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing (29 U.S.C.A. 161 (1)).

* * * *

Fifth Amendment to the Constitution of the United States:

No person shall . . . . be deprived of life, liberty, or property, without due process of law . . . .

Fourteenth Amendment:

Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 358

W. W. CHAMBERS COMPANY, INC., *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 1a-2a) is not yet reported. The Board's decision and order (R. 93-97)[1] are reported at 125 NLRB No. 78.

JURISDICTION

The judgment of the Court of Appeals was entered on June 16, 1960 (Pet. 2a-3a). The petition for a writ of certiorari was filed on August 24, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "R" refers to the Joint Appendix filed with the court below.

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's findings that petitioner violated Sections 8(a)(3) and (1) by discharging two employees engaged in union activities and by coercively interrogating other employees concerning their union participation.

2. Whether petitioner was denied due process of law at the unfair labor practice hearing.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth in the Appendix to the petition (Pet. 7a-11a).

STATEMENT

A. *The Board's Findings.*—In January 1959, employees Crase and Morrison requested help of Office Employees International Union, Local 2, AFL-CIO, in organizing their fellow employees (R. 74, 79; 32-33, 41). The Union supplied application cards which were subsequently signed by an undisclosed number of employees (R. 74-75; 33, 41). On February 17, nine employees including Crase and Morrison attended a Union meeting, and the signed application cards were returned to Union business agent Etheredge (R. 74-75; 6-7, 34, 42).

On February 18, Etheredge telephoned Company President W. W. Chambers and requested recognition of the Union (R. 75; 7-8). Chambers asked for the names of employees who had signed cards but Etheredge declined to reveal them. Instead, he proposed a card check against the Company payroll by a disinterested person to resolve any doubt as to the Union's majority status (R. 75; 7-8). Chambers rejected this suggestion and Etheredge concluded the discussion by

stating that the Union would file a representation petition with the Board (R. 75; 7-8).

Later in the same day Chambers contacted Company Vice-President Echols and Assistant General Manager Tolson and asked whether either knew of Union activity among Company employees. Both Company officials replied in the negative (R. 75; 15, 23, 27, 28).

That same evening, Assistant General Manager Tolson questioned five or six employees about the Union activity, inquiring whether "they had attended any union meeting" and also "trying to find out . . what men and how many men were going to be affiliated with the union meeting that had taken place" (R. 75; 15-16, 20). Tolson reported to Chambers later that evening that he had learned that there had been a Union meeting attended by a few employees (R. 75; 18). A day or so afterward, Chambers told Tolson that employee Howard had acknowledged attendance at the Union meeting (R. 75-76, 18-19).

On February 19, Vice-President Echols questioned about 12 employees concerning their interest in joining the Union and whether they had signed Union cards. Although some employees admitted attending the meeting, none acknowledged having signed a Union card (R. 76; 24-27). When Chambers asked Echols later that day to make an inquiry about the Union activity, Echols replied that he "had already done the job" and could report to Chambers at that time what he had learned of the employees' Union sympathies (R. 76; 27).

On the morning of February 19, Chambers called employee Crase to his office and asked him about the Union activities and the participation of Crase and other employees (R. 77; 35). Crase admitted contacting the Union representative but evaded answering.

questions regarding other employees. Chambers accused Crase of being "disloyal," presented him with his paycheck and discharged him (R. 77; 35).

A few minutes later employee Morrison was called to Chambers' office (R. 77; 34, 43). Chambers questioned Morrison "about this union business" and about "this meeting that happened the other night," but Morrison answered that he could tell Chambers "very little" (R. 77; 34, 43). Thereupon Chambers remarked that he expected loyalty from his employees and that Morrison had demonstrated his disloyalty. Chambers then presented Morrison his paycheck and discharged him.

B. *The Board's Conclusions and Order.*—On the basis of the foregoing facts, the Board affirmed the Trial Examiner's finding that the Company had violated Sections 8(a)(3) and (1) of the Act by discharging employees Crase and Morrison for their Union activities and by unlawfully interrogating other employees concerning Union matters (R. 93).

The Board's order (R. 94-97) requires the Company to cease and desist from discharging or in any other manner discriminating against its employees because of their concerted or other union activities, and from interrogating its employees, or in any other manner interfering with, restraining or coercing its employees in the exercise of their rights under the Act. Affirmatively, the Board ordered the Company to reinstate Crase and Morrison with back pay and to post appropriate notices.

C. *The decision of the Court of Appeals.*—The Court of Appeals, in a *per curiam* decision, affirmed the Board's findings as adequately supported by the record and enforced the Board's order (Pet. 1a-2a).

ARGUMENT

1. Petitioner's substantive contention is that the Board's findings are not supported by substantial evidence and that the Board "ignored all the evidence given by one side and with studied design gave credence to the testimony of the other side" (Pet. 14). The court below, however, found that "substantial evidence" supported the Board's findings that the Company discriminatorily discharged employees Crase and Morrison and coercively interrogated employees about their union activities and that these "findings support the order." The facts summarized in the Statement fully justify that conclusion. In these circumstances, no issue warranting further review by this Court is presented. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

2. Equally insubstantial is petitioner's contention that it was denied due process of the law by various events occurring at the unfair labor practice hearing (Pet. 7-10). The record reveals that the decision of petitioner's president Chambers himself to represent the Company's interests at the hearing was a voluntary one. Moreover, the Trial Examiner, aware of the fact that Chambers was not an attorney, exercised care to see that he understood his rights and the issues of the case, offered suggestions in the conduct of his cross-examination, and relaxed any technicality which might handicap a layman (See R. 9, 11, 12, 17-18, 22-23, 29-30, 49, 50, 52, 53, 59-62, 65).

No denial of Chambers' right to present or examine witnesses or to introduce evidence occurred. When, during the examination of witnesses Tolson and Echols by counsel for the General Counsel, each witness was shown his own affidavit, the Trial Examiner directed that a copy be handed over to Chambers and declared

a five-minute recess so that he might examine the document (R. 17-18, 22). Chambers did not ask for the recess in either case nor did he thereafter indicate that he wished further time. Furthermore, at the close of petitioner's case, which consisted only of Chambers' testimony, the Trial Examiner asked, "Any more witnesses?", and Chambers replied, "I have none" (R. 59).[2] Finally, the Trial Examiner properly rejected Chambers' offer to submit as evidence a decision of the District Workmen's Compensation Board that employee Morrison was not discharged for insubordination, as there claimed by petitioner, but only because "he did not render service satisfactory to the employer" (R. 67). The proceedings before that body, in which the Board did not participate and which did not purport to go into the unfair practice questions here, could have no direct bearing on the Board's determination in this case.

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[2] And when Chambers, in the course of his closing argument (R. 64-65), alluded to fact that he could bring witnesses in, the Trial Examiner spoke to him as follows (Transcript, p. 117):

> TRIAL EXAMINER: Mr. Chambers, on two or so occasions in your argument, you spoke of witnesses whom you might call but have not called. In one instance you said your motive was to expedite the hearing. I want this record to be clear that you have not been precluded from calling one nor has any suggestion been made to you that you have not called a witness. The decision is entirely yours.
> MR. CHAMBERS: I understand.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel.

NORTON J. COME,
Assistant General Counsel.

HERMAN M. LEVY,
Attorney,
National Labor Relations Board.

September 1960

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